IN THE MATTER OF TONG ENG SDN. BHD

HIGH COURT, PENANG
TUAN T. SELVENTHIRANATHAN JC
[ORIGINATING PETITION NO. 26-4-91]
29 OCTOBER 1993

COMPANY LAW: Petition filed under s. 181 of Companies Act 1965 - Application to strike out petition - Application made under O. 18 r. 19 Rules of the High Court 1980 - Whether petittion discloses a reasonable cause of action.

Tong Eng Sdn. Bhd. (the Company) sought to pass two resolutions, for the distribution of a dividend *in specie* and for the disposal of its property, at an extraordinary general meeting of the shareholders. Loh Loon Keng (the Petitioner), a minority shareholder and one of the directors of the Company, filed a petition under s. 181 of the Companies Act 1965 (the Act) seeking orders declaring that the proposed resolutions were not made *bona fide* and prohibiting the Company from declaring the dividend *in specie*.

The Company applied to set aside the orders granted on the grounds that the petition disclosed no reasonable cause of action and that it was an abuse of the process of the Court under O. 18 r. 19 of the Rules of the High Court 1980.

The question before the Court was whether the Petitioner had managed to bring himself within one of the two limbs of s. 181(1) of the Act so as to be able to complain of oppresion, unfair discrimination or of being otherwise prejudiced.

Held:

[1] The two proposed resolutions would not affect the Petitioner in particular as a member, shareholder or holder of debentures of the Company. The proposed resolutions would affect all the shareholders collectively without the Petitioner being singled out for oppression, or unfair discrimination or other prejudicial treatment so as to trigger off the protection mechanism in s. 181(1) of the Act.

[2] It is not the duty of the Court in these circumstances to assume the role of policeman over the affairs of the Company. It is for the shareholders at the meeting to be convened to decide whether the distribution of the dividend *in specie* should be approved or not.

[3] Insofar as the proposed disposal of the property of the Company is concerned, it is for the shareholders to decide whether they wish to authorise the directors to have full power to sell the property. If the majority of the shareholders so decide, then the will of the majority will have to prevail.

[4] There is nothing in the pleadings as reflected in the petition which shows that the Petitioner is affected apart from and over and above the other shareholders of the Company so as to enable him to seek any relief under s. 181(2)(a) of the Act. On the pleadings itself the Company has satisfactorily shown that the petition discloses no reasonable cause of action against the Company from the time the petition was filed up to the present.

[Company's application to strike out petition allowed with costs].

Cases referred to:
Foss v. Harbottle [1843] 2 Hare 461 ***(foll)***

Legislation referred to:
Companies Act 1965, s. 181(1), (2)(a)
Rules of the High Court 1980, O. 18 r. 19
Companies Act, s. 216 (Singapore)

Other sources referred to:
Cases and Materials in Company Law, LS Sealy, 4th Edn., p. 445
Company Law, Walter Woon,1988 Edn., pp. 121, 126

JUDGMENT

T. Selventhiranathan JC:
This is an application by the respondent company, Tong Eng Sdn Bhd, [vide enclosure (13)] for the following orders:

(a) that the originating petition herein be struck out on the grounds that:
  (i) it discloses no reasonable cause of action; and/or
  (ii) it is an abuse of the process of the court under O. 18, r. 19 the Rules of the High Court 1980, and/or under the inherent jurisdiction of the Court;

(b) that the injunction dated 22 April 1991 granted by Mr Justice Edgar Joseph Jr. as he then was) be dissolved;

(c) that an inquiry as to damages be ordered in the event that the injunction is dissolved;

(d) that the costs of the application be paid by the petitioner to the respondent company.

The application was supported by the affidavit of Loh Loon Teik, a director of the respondent company.

On the first ground of the application that the petition discloses no reasonable cause of action the respondent company cannot rely on any affidavit evidence. In the circumstances it is incumbent upon the Court to look at the petition and consider whether it does indeed disclose no reasonable cause of action.

The petition shows that the petitioner is a minority shareholder and one of the four directors of the respondent company. The petitioner alleged that on 3 April 1991, he received notice of an extraordinary general meeting of the shareholders of the respondent company which would be held on 22 April 1991 for the purpose of considering and, if thought fit, to pass two ordinary resolutions. The first resolution was to propose that the respondent company declare a dividend *in specie* to be satisfied by the distribution of its entire shareholding of 408,000 shares in the capital of Trio Paper Mills Sdn Bhd to its shareholders in proportion to their shareholding in its capital. The second resolution was for the directors of the respondent company to be authorised to dispose of all that piece of land and hereditaments known as lot 77, Mukim 17 North-East District, Penang ("the property") on or before 31 March 1992 at whatever price and upon whatever terms and conditions deemed reasonable.

The extraordinary general meeting, according to the petitioner, was allegedly called by order of the board of directors of the respondent company. The petitioner complained that he is a director and member of the board and it was not true that the resolutions were put forth by order of the board as they were not on the agenda of its meeting in question. He also complained that the valuation of the shares in Trio Paper Mills Sdn. Bhd. was not done properly and so it was not in the interest of the respondent company to have those shares distributed. He complained further that there was no valid reason why the respondent company should sell its property in Batu Ferringhi as it was not in need of funds as revealed by its balance sheet. In addition there was no valuation of the property and the proposed resolutions were vague and gave the directors freedom to manipulate. However, the petitioner did not reveal that he was in fact given the responsibility of finding a buyer for the property.

The petitioner complained further that he had been denied access to the accounts of the respondent company and to the minutes of (the meetings of) the board of directors and it was only after he had filed originating summons 24-661-90 and obtained an order of Court that he was able to have such access. The petition itself does not reveal whether he did in fact obtain the accounts and minutes but he must have done so in order for him to have exhibited the accounts to the affidavit in support of the petition.

The petitioner also alleged that the proposed resolutions were aimed at stripping the respondent company of its assets by disposing of its valuable assets at nominal values and to forestall the petitioner from taking legitimate action against the respondents *(sic)*, including the appointment of a receiver and manager (of the respondent company). The action of the respondents *(sic)* in calling the extraordinary general meeting was not in the interest of the respondent company and its assets were being put in jeopardy. The petitioner therefore asked for the following orders in paragraph 19 (which should in fact be paragraph 20) of the petition:

(a) an order declaring that the proposed resolutions were not made *bona fide* in the interest of the respondent company and were therefore bad in law and invalid;
(b) an order prohibiting the respondent company from passing or otherwise giving effect to the first ordinary resolution (to declare a dividend *in specie* of its entire shareholding in Trio Paper Mills Sdn. Bhd.);
(c) for appropriate remedies under s. 181 of the Companies Act 1965 ("the Act");
(d) for the appointment of a receiver and manager.

It is observed that paragraph 19 of the petition is nothing but a repetition of paragraphs (a) and (b) of subsection (1) of s. 181 of the Act, and paragraph 19 does not really show how the facts are related to the law. If one were to look at the other paragraphs of the petition, the essential complaint of the petitioner is that the respondent company is seeking to distribute a dividend *in specie* which he claims is not in the interest of

the respondent company, and also to dispose of its property. As far as s. 181 of the Act is concerned, for a petition to be filed under that section it is incumbent upon the petitioner to show:

(a) that the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members or holders of debentures including himself or in disregard of his or their interests as members, shareholders or holders of debentures of the company; or

(b) that some act of the company has been done or is threatened or that some resolution of the members, holders of debentures or any class of them has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the members or holders of debentures (including himself).

It is therefore abundantly clear that before any petitioner can seek the relief specified under subsection (2) of s. 181 of the Act, he has to first bring himself within one of the two limbs of subsection (1) so as to be able to complain of oppression, or unfair discrimination or being otherwise prejudiced.

To my mind the two proposed resolutions would not affect the petitioner in particular as a member, shareholder or holder of debentures of the respondent company. The proposed resolutions would affect all the shareholders collectively without the petitioner being singled out for oppression, or unfair discrimination or other prejudicial treatment so as to trigger off the protection mechanism in s. 181(1) of the Act. It is not the duty of the Court in these circumstances to assume the role of policeman over the affairs of the respondent company. The two proposed resolutions involve the interests of the respondent company and its shareholders as a whole. It is for the shareholders at the meeting to be convened to decide whether the distribution of the dividend *in specie* should be approved or not. This is a practice which is not unknown of and the Court takes judicial notice of the fact that even public listed companies resort to this form of dividend distribution to reward their shareholders instead of distributing dividend in cash. Insofar as the proposed disposal of the property of the respondent company is concerned, this is again a matter for the shareholders to decide whether they wish to authorise the directors to have full power to sell the property. If the majority of the shareholders so decide, then the will of the majority will have to prevail. The acts complained of here do not affect the petitioner alone in his capacity as a member of the respondent company.

The situation in this case is one which comes within the rule in *Foss v.Harbottle* [1843] 2 Hare 461 and the whole catenation of cases which derive their authority from that case and reinforce the principle that where the interests of a company are involved as a whole, it is the company itself which should be concerned and that concern is expressed through the will of the shareholders at the general meeting. Should the shareholders determine that the directors are in fact acting against the interests of the company, then it is for them to remove the directors. The rule in *Foss v. Harbottle* is stated thus by LS Sealy in **"Cases and Materials in Company Law"**, fourth edition, at p. 445:

> The Court will not ordinarily intervene in a matter which it is competent for the company to settle itself or, in the case of an irregularity, to ratify or condone by its own internal procedure. Where it is alleged that a wrong has been done to a company, *prima facie* the only proper plaintiff is the company itself

This is repeated by Walter Woon in **"Company Law",** 1988 Edn., at p. 126:

> Section 216 (of the Companies Act of Singapore which is in *pari materia* with s. 181 of the Act) embodies a member's personal right to be treated fairly. As such, the rule in *Foss v. Harbottle* does not restrict a member's ability to petition for relief. Section 216 belongs in the class of members' personal rights and therefore properly falls outside the scope of the proper plaintiff rule. However, it must be clear that the member is indeed seeking relief in respect of an injury done to himself. **Where what is complained of is in fact an injury to the company and not to the petitioning member, the proper plaintiff is the company itself. It should be borne in mind that an injury to the company is not *ipso facto* an injury to the members:** *Prudential Assurance Co Ltd v. Newman Industries Ltd* (No. 2) [1982] 1 All ER 354.

At page 121 of the same textbook, Walter Woon has this to says:

> Mismanagement of the company does not necessarily constitute oppression or disregard of a member's interests: *Re Five Minute Car*

Wash Service Ltd. [1966] 1 All ER 242. Nor, indeed, does the fact that a member is consistently outvoted mean that he is oppressed or that his interests are being disregarded. It should be remembered that the majority also has rights. Section 216 does not give jurisdiction to the Court to interfere with the internal management of companies which are being managed honestly and in accordance with the law: *Re Bright Pine Mills Pty. Ltd*. [1969] VR 1002.

The acts complained of must affect the member in his capacity as a member. This is apparent from the wording of the section itself: *Re HR Harmer Ltd*. [1958] 3 All ER 689. If the acts in question affect the complainant in some capacity other than as member, he has no right to complain under s. 216. For example, a director may feel that the other directors are unfairly excluding him from the management of the company. Even if he is a member of the company, this does not come within the ambit of s. 216 since then he is oppressed in his capacity as director, not as member. However, if a person is oppressed in his capacity as member he may get relief in respect of acts that affect him in some other capacity as well.

There is nothing in the pleadings as reflected in the petition which shows that the petitioner is affected apart from and over and above the other shareholders of the respondent company so as to enable him to seek any relief under s. 181 (2)(a) of the Act, ie to apply to the Court to direct or prohibit any act or cancel or vary any transaction or resolution of the respondent company. The pleadings do not show what the petitioner is seeking to do or how exactly the two proposed resolutions which are complained of fall within the ambit of s. 181 of the Act. I find that on the pleadings itself the respondent company has satisfied me that the petition discloses no reasonable cause of action against the respondent company from the time the petition was filed up to the present and I therefore make an order in terms of the application in enclosure (13) that the petition herein be struck out. By reason of this order it naturally follows that the injunction dated 22 April 1991 is also dissolved. I further order that an enquiry be held by the senior assistant registrar to assess the damages which the respondent company may have sustained as a result of the injunction. Finally I order that the costs of these proceedings be paid to the respondent company by the petitioner.

In view of my decision on this application in enclosure (13), there is no need for me to proceed further to consider the application in enclosure (19) for the appointment of a provisional receiver and manager as the effect of my decision is to bring these proceedings to an end.

En Passant, I thank both Encik Loh Choong Wai and Encik Tan Phock Kin for their assistance to the Court but would for the future urge Counsel in cases where they appear to prune their written submissions and copious authorities to the necessary minimum so as to reduce the impingement on everybody's time. It would be of further considerable help to the Court to reduce the plethora of unnecessary affidavits and applications, the filing of which also leads to an escalation of the parties' costs.